

# Information Law Update

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**Landmark Chambers**  
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# Overview



- New Data Protection Act 2018
- Freedom of Information
- Environmental Information

# Data Protection Bill (1)



- Data Protection Bill: published and put before Parliament 14<sup>th</sup> September (second reading will be 10<sup>th</sup> October)
- Implementation of: General Data Protection Directive 2016/679 (GDPR)
- Brexit-proofing
- 7 parts
- Parts 1 and 2- definitions and general processing
- Parts 3 and 4- data processing in the context of law enforcement and the intelligence services
- Part 5- the ICO
- Part 6- enforcement
- Part 7- offences, additional data subject rights, territorial application of the UK's legislation

## Data Protection Bill (2)



- 18 Schedules
- Schedule 1- the conditions for processing ‘special category’ personal data (‘sensitive personal data’ within Data Protection Act 1998) and criminal conviction information
- Schedules 2-4- exemptions from the GDPR rights and duties
- Schedule 6- Brexit proofing

## Data Protection Bill (3)



- Defines ‘public authority’
- Clause 6- public authority for GDPR purposes if a public authority for FOIA purposes (or designated one by Secretary of State through regulations)
- FOIA treats publicly-owned companies as public authorities- carry through to data protection
- Exemptions largely familiar- important additional test going beyond current s35 DPA 1998
- Necessity to consider the extent to which the application of the relevant GDPR principle “would prevent the data controller from making the disclosure that they need to make for the purposes of legal proceedings or protecting their legal position”.

## Freedom of Information: *Savic*



- *Savic v Information Commissioner & Attorney General's Office & Cabinet Office* [2016] UKUT 534 (AAC) and *Savic 2* UKUT 535
- FOIA appeals re UK's military activity in Kosovo and Serbia in 1999
- *Savic 1*- request for the Attorney General's legal advice provided at the time (engaging s35(1)(c) exemption)
- *Savic 2*- request to Cabinet Office for all records of the decision to commence military action, including any Cabinet minutes and inter-Departmental correspondence
- = NCND response
- Re: Cabinet minutes (s35(3)), any possible involvement of the security bodies (s23(5)), general reliance on s27(1)
- Applicant solicitor in *Kontic v MoD* (aerial bombardment by the UK)

## Savic (contd)



- *Savic 1*- obvious link between the public interests underlying the s35(1)(c) exemption and for advice of the law officers, and in s42.
- FOIA had made both exemptions qualified- a departure from the absolutist approach of the common law to the protection of LPP.
- There is no right to withhold privileged information, but longstanding case law has identified powerful public interest factors served by the exemptions.
- When does the balance likely favour non-disclosure? [35]
- Additional factor of the advice of the law officers [37]
- Fact sensitivity
- Impact of the passage of time [52]
- Was the military action purely historical?

## *Savic 2*



- Application of the NCND provisions
- Use of the closed procedure
- Nature of the public interest balancing process in a NCND response [61-62]
- Cabinet Office's position [73-77]
- Prejudice to international relations [112], [116], [127]

## Costs Limitation



- *Metropolitan Police v Information Commissioner & Mackenzie* [2014] UKUT 479 (AAC)
- s12 cost limit [42]
- Breadth of the request (requestor has control)
- Record-keeping practices of the public authority (requestor has no control)
- What is required: a reasonable and realistic estimate of the costs of complying with the request; not what the costs ought to be
- *Cruelty Free International v Information Commissioner* [2017] UKUT 318 (AAC)

# *Department of Health v Information Commissioner and Lewis*



- [2017] EWCA Civ 374
- Andrew Lansley's Ministerial diary
- Qualified exemption engaged
- No presumption in favour of disclosure
- Where the public interests balance evenly? [46]
- Need for requestor or ICO to spell out in detail the benefits of disclosure?

# Environmental information



- Reg 2(1)(c) EIR – **information on a measure likely to affect the environment**
- *DECC v IC and Henney* [2015] UKUT 0671 (AAC); *BEIS v IC and Henney* [2017] EWCA Civ 844
- Which access regime applies
- (2013 request- copy of Project Assessment Review- of data and communications component of Govt's Smart Meter Programme)
- One of SMP aims- reduce CO2 emissions= a measure affecting the environment
- Compare PAR- the data and communications component itself
- Whether and in what circumstances permissible to look to the effects of a measure beyond that with which the information is most directly concerned, to bring it within the Reg 2(1) definition
- UT- permissible to have regard to the 'bigger picture' in considering whether the information at issue was 'information on' some broader measure that affects the environment, provided that there was a 'sufficient connection' between the information and the wider measure
- Does that allow the context of the information to become its subject? (BEIS argument)
- CA: information can be 'on' more than one measure; the definition does not require that the measure that it is primarily 'on' be the one with the environmental effects, nor that the information is directly or immediately concerned with that measure

(contd)



- Limits
- How far can one analyse the word “on” ...
- The test is whether the information is ‘on’ the measure that affects the environment
- Some glosses [37]- information is ‘on’ a measure if it is about, relates to or concerns the measure in question
- Underlying purpose: to promote more effective public participation in environmental decision-making [47-48]; sight of the PAR would mean better placed to comment on the appropriate data model and help achieve the environmental objectives of the SMP [54]
- Check whether the disclosure would/not advance the purposes of the Aarhus Convention and the Directive as a way of testing whether there is a ‘sufficient connection’ between the information and the environmental measure